ADM Ventures (M) Sdn Bhd (suing on behalf of themselves and the shareholders, for the benefit of GT Global Race (M) Sdn Bhd) v Renew Capital (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC–425–12 OF 2016
LAU BEE LAN J
20 AUGUST 2018

Civil Procedure — Striking out — Application to strike out plaintiff's claim — Whether defendants in full control of company — Whether plain and obvious case to strike out — Whether plaintiff had locus standi to initiate derivative action — Rules of Court 2012 O 18 r 19 — Companies Act 1965 s 181

Companies and Corporations — Derivative action — Fraud on minority — Whether pleaded facts adequate to bring action within exception to rule in Foss v Harbottle — Whether plaintiff had locus standi to initiate derivative action

Five striking out applications were filed pursuant to O 18 r 19 of the Rules of Court 2012 ('the ROC') and inherent power of the court. In the present case, the 11th defendant submitted a formal proposal vide a letter dated 30 November 2013 to the tenth defendant to organise an annual race known as GT City Race-KL in Kuala Lumpur. The tenth defendant and the 11th defendant entered into a memorandum of agreement dated 10 April 2014 to organise the GT City Race-KL. The tenth defendant entered into a financial assistance agreement with the 11th defendant and provided financial assistance in the sum of RM30m to the 11th defendant to organise the said race. Subsequently, the 11th defendant breached the terms of memorandum of agreement and financial assistance agreement. By a letter dated 13 October 2015, the solicitors for the plaintiff put all parties on notice in respect of ss 219 and 223 of the Companies Act 1965 ('the Act'). The plaintiff filed a winding up petition against the 11th defendant in Kuala Lumpur High Court. The plaintiff informed Dewan Bandaraya Kuala Lumpur ('DBKL') about the winding up petition and served a copy of the petition to DBKL. The plaintiff's solicitor wrote to the tenth defendant stating inter alia that they are ready, willing and able to discharge their obligations and that the tenth defendant might be liable for interference and for acting contrary to the spirit and intent of memorandum of agreement if the tenth defendant granted a third party rights to organise the said race. On 5 February 2016, DBKL wrote to the plaintiff's solicitor to confirm the termination and asserted its right to enter

into contract with any third parties. An affidavit then was filed at Kuala Lumpur High Court stating that the bank account of the 11th defendant was frozen as the result of winding up petition filed by the plaintiff against the 11th defendant. The plaintiff intended to take steps to protect their rights and a derivative action then was filed in March 2016 together with application for injunction. In 20 May 2016, the ninth defendant filed an application to strike out. In the main action, the plaintiff had initiated a derivative action by way of a representative action as a 50% shareholder on behalf of itself and for the benefit and on behalf of the 11th defendant. The disputed issue was whether the plaintiff had the locus standi to initiate the derivative action as it was argued that the plaintiff had not satisfied the following condition: (a) whether the action fell within the proper boundaries of the exception to the rule in *Foss v Harbottle*; and (b) whether the wrongdoers were in actual control of the company.

Held, allowing the defendants' applications with costs to be paid to the defendants:

(1) As correctly submitted by the tenth defendant, the plaintiff had to establish on a higher scale that the tenth defendant had fraudulently acted against the 11th defendant. Based on the evidence before the court, it was found that the plaintiff had failed to establish there was a fraud on the minority. With regard to the allegation that there was a breach of contract in terminating the memorandum of agreement, it was the plaintiff who had represented to the tenth defendant that the 11th defendant was insolvent and was incapable of paying its creditors and was subjected to multiple proceedings. The court was of view that it was practically impossible for the 11th defendant to organise the said race within the scheduled time and therefore the tenth defendant had validly terminated the memorandum of agreement. With regards to the inducement of breach of memorandum of agreement, it was devoid of any merits as the termination was supported by the facts in the winding up petition filed by the plaintiff (see paras 17, 17(a) & 17(d)–17(f)).

(2) The evidence showed that the tenth defendant was not aware of the internal management and dispute in the 11th defendant. It was impossible for the tenth defendant was a wrongdoer of the 11th defendant as it was neither a shareholder nor director of the 11th defendant. The court was of that view that unlike the statutory derivative action in s 181 of the Act where a petition could be directed against any person, not necessarily against the directors or shareholders only who was involved in the affairs of the company or involved in the same act of the company in a manner oppressive or which unfairly discriminate or

prejudicial to the members, shareholders of debenture holders, in a common law derivative action third parties could not be named as defendants. The plaintiff therefore had no locus standi to initiate the present case against the defendants (see paras 18 & 21–22).

[Bahasa Malaysia summary

Lima permohonan pembatalan telah difailkan menurut A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan kuasa yang wujud dalam mahkamah. Dalam kes ini, defendan ke-11 mengemukakan cadangan rasmi melalui surat bertarikh 30 November 2013 kepada defendan ke-sepuluh untuk menganjurkan perlumbaan tahunan yang dikenali sebagai GT City Race-KL di Kuala Lumpur. Defendan ke-sepuluh dan defendan ke-11 telah menandatangani memorandum perjanjian bertarikh 10 April 2014 untuk menganjurkan GT City Race-KL. Defendan ke-sepuluh memasuki perjanjian bantuan kewangan dengan defendan ke-11 dan memberikan bantuan kewangan sebanyak RM30 juta kepada defendan ke-11 untuk menganjurkan perlumbaan tersebut. Selepas itu, defendan ke-11 melanggar terma memorandum perjanjian dan perjanjian bantuan kewangan. Melalui surat bertarikh 13 Oktober 2015, peguam plaintif meletakkan semua pihak dalam notis berkenaan dengan ss 219 dan 223 Akta Syarikat 1965 ('Akta'). Plaintif memfailkan petisyen penggulungan terhadap defendan ke-11 di Mahkamah Tinggi Kuala Lumpur. Plaintif memaklumkan Dewan Bandaraya Kuala Lumpur ('DBKL') mengenai petisyen penggulungan dan menyampaikan salinan petisyen kepada DBKL. Peguam plaintif menulis kepada defendan ke-sepuluh yang menyatakan antara mereka bahawa mereka bersedia, sanggup dan mampu menunaikan kewajipan mereka dan bahawa defendan ke-sepuluh mungkin bertanggungjawab untuk campurtangan dan bertindak bertentangan dengan maksud dan niat memorandum perjanjian jika defendan ke-sepuluh memberi hak pihak ketiga untuk menganjurkan perlumbaan tersebut. Pada 5 Februari 2016, DBKL menulis kepada peguam plaintif untuk mengesahkan penamatan dan menegaskan hak untuk membuat kontrak dengan mana-mana pihak ketiga. Afidavit kemudiannya difailkan di Mahkamah Tinggi Kuala Lumpur yang menyatakan bahawa akaun bank defendan ke-11 telah dibekukan sebagai hasil petisyen penggulungan yang difailkan oleh plaintif terhadap defendan ke-11. Plaintif bertujuan untuk mengambil langkah-langkah untuk melindungi hak-hak mereka dan tindakan derivatif kemudian difailkan pada Mac 2016 bersama-sama dengan permohonan injunksi. Pada 20 Mei 2016, defendan kesembilan memfailkan permohonan pembatalan. Dalam tindakan utama, plaintif telah memulakan tindakan derivatif melalui tindakan wakil sebagai pemegang saham 50% bagi pihak dirinya sendiri dan bagi faedah dan bagi pihak defendan ke-11. Isu yang dipertikaikan adalah sama ada plaintif mempunyai lokus standi untuk memulakan tindakan derivatif kerana ia berpendapat bahawa plaintif tidak berpuas hati dengan syarat berikut: (a) sama ada tindakan itu jatuh di dalam lingkungan yang berpatutan bagi kecualian kepada aturan di dalam *Foss v*

A *Harbottle*; dan (b) sama ada pesalah sebenarnya mengawal syarikat itu.

Diputuskan, membenarkan permohonan defendan dengan kos dibayar kepada defendan:

B (1) Sebagaimana yang dikemukakan oleh defendan ke-sepuluh, plaintif perlu membuktikan pada skala yang lebih tinggi bahawa defendan ke-sepuluh telah bertindak secara fraud terhadap defendan ke-11. Berdasarkan keterangan di hadapan mahkamah, didapati bahawa plaintif telah gagal membuktikan ada penipuan terhadap minoriti. Berhubung C dengan tuduhan bahawa terdapat pelanggaran kontrak dalam menamatkan memorandum perjanjian, plaintif yang telah mewakili defendan ke-sepuluh bahawa defendan ke-11 adalah tidak solven dan tidak mampu membayar pemiutangnya dan dikenakan pelbagai prosiding. Mahkamah berpendapat bahawa adalah mustahil bagi D defendan ke-11 untuk menganjurkan perlumbaan tersebut dalam masa yang ditetapkan dan oleh itu defendan ke-sepuluh telah dengan sah menamatkan memorandum perjanjian. Berhubung dengan dorongan pelanggaran memorandum perjanjian, ia tidak mempunyai apa-apa merit kerana penamatan itu disokong oleh fakta-fakta dalam petisyen E penggulungan yang difailkan oleh plaintif (lihat perenggan 17, 17(a) & 17(d)–17(f)).

(2) Keterangan menunjukkan bahawa defendan ke-sepuluh tidak menyedari pengurusan dalaman dan pertikaian dalam defendan ke-11. Adalah F mustahil bagi defendan ke-sepuluh adalah pesalah defendan ke-11 kerana ia bukan pemegang saham mahupun pengarah defendan ke-11. Mahkamah berpendapat bahawa tidak seperti tindakan derivatif statutori di dalam s 181 Akta di mana suatu petisyen boleh dibawa terhadap mana-mana orang, tidak semestinya terhadap pengarah atau G pemegang saham hanya yang terlibat dalam hal ehwal syarikat atau terlibat dalam perkara yang sama dalam syarikat dengan cara yang menindas atau yang mendiskriminasi secara tidak adil atau memudaratkan ahli-ahli, pemegang saham pemegang debentur, dalam tindakan derivatif di bawah common law pihak ketiga tidak boleh H dinamakan sebagai defendan. Oleh itu, plaintif tidak mempunyai lokus standi untuk memulakan kes ini terhadap defendan (lihat perenggan 18 & 21–22).]

I **Notes**

For a case on application to strike out plaintiff's claim, see 2(5) *Mallal's Digest* (7th Ed, 2017 Reissue) para 9355.

For cases on fraud on minority, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 166–173.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)
Foss v Harbottle (1843) 2 Hare 461 (refd)
Kondapuram Raghuram v Soo Peng @ Yew Soo Peng [2006] 7 MLJ 510, HC (refd)
Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors [2004] 6 MLJ 37, HC (refd)
Ranjeet Singh Sidhu v Zavarco Plc [2015] MLJU 638; [2016] 2 CLJ 975, HC (distd)
See Hua Realty Bhd (suing on behalf of itself and all other shareholders of the defendant except for the first and second defendant) v KTS News Sdn Bhd & Ors [2016] 1 MLJ 92, CA (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487, HC (refd)

Legislation referred to

Companies Act 1965 ss 181, 219, 223
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

Porres Royan (Prem Ramachandran and Puvvana Muthuvelu with him) (Kumar Partnership) for the plaintiff.
Dhanaraj (James Ee Kah Fuk, Kalai Selvi and Muhammad Ariff with him) (KF Ee & Co) for the first, second, third, fourth, fifth, sixth and 11th defendants.
R Rishi (Rishi & Partners) for the seventh and eighth defendants.
Satharuban Sivasubramaniam (Ranjini Anndy with him) (Satha & Co) for the ninth defendant.
Thangaraj (Thangaraj & Assoc) for the tenth defendant.

Lau Bee Lan J:

[1] Five striking out applications were heard together. They are:

(a) encl 36 by D1 (Renew Capital/RC), D2 (Tunku Naquiyuddin/ TN), D3 (Tunku Khairul/TK), D4 (Marcus), D5 (Neil), D6 (Dilantha) and D11 (GT Global Race (M) Sdn Bhd ('GT Global'));

(b) encl 17 by D7 (Faizal Maulana bin Hasan Kutti ('Faizal'));

(c) encl 18 by D8 (City Motorsports Sdn Bhd ('City Motorsports'));

(d) encl 30 by D9 (Tengku Adnan bin Tengku Mansor ('TA')); and

(e) encl 32 by D10 (Dato Bandar Kuala Lumpur ('DBKL')).

Enclosures 36, 17 and 18 were filed pursuant to O 18 r 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of Court 2012 ('the ROC 2012') and/or the inherent power of the court.

Enclosures 30 and 32 were filed pursuant to O 18 r 19(1), (b), (c) and (d) of the ROC 2012 and the inherent power of the court.

[2] Having considered the written cum oral submissions of the respective counsel for D1–D6 and D11 (Mr KF Ee), D7 and D8 (Mr R Rishi), D9 (Dato' Satharuban) and D10 (Mr B Thangaraj) I had allowed the striking out application on the sole preliminary threshold issue of locus standi. Hence these appeals by the plaintiff.

[3] At the outset I wish to highlight that Dato' Prem Ramachandran of counsel for the plaintiff on 4 August 2018 stated:

(a) If the Court is not with the Plaintiff, then the action of the striking out should be allowed for all; and

(b) Even if the Court finds in favour of D10 alone on the threshold argument, I would not be able to proceed with conspiracy.

[4] For context, the following relevant chronology of events have been drawn from D9's written submission:

30 November 2013	D11 submitted a formal proposal vide a letter dated 30 November 2013 to D10 to organise an annual race known as GT City Race-KL in the City of Kuala Lumpur.
16 January 2014	D10 approved the said proposal vide a letter dated 16 January 2014.
10 April 2014	D10 and D11 entered into a memorandum of agreement dated 10 April 2014 to organise the GT City Race-KL.
15 July 2015	D10 entered into a financial assistance agreement dated 15 July 2015 with D11 and provided financial assistance in the sum of RM30m to D11 to organise the said race.
7–9 August 2015	The said race was held from 7–9 August 2015 and subsequently D11 breached the terms of the memorandum of agreement and financial assistance agreement.
13 October 2015	By letter dated 13 October 2015, the solicitors for ADM put all parties on notice in respect of ss 219 and 223 of the Companies Act 1965.

13 October 2015	ADM filed winding up petition against D11 vide Kuala Lumpur High Court Winding-Up Petition No 28NCC-857–10 of 2015 ('Winding Up Petition 857').
11 November 2015	ADM (through its solicitors letter dated 11 November 2015) informed DBKL about the winding up petition and served a copy of the petition to DBKL.
1 December 2015	D9 received a letter dated 1 December 2015 from ADM and the said letter set out the internal disputes between the plaintiff and the first defendant and the dissipation of the financial assistance granted by DBKL to D11.
11 January 2016	The memorandum of agreement dated 10 April 2014 between D10 and D11 was terminated by D10.
11 January 2016	The plaintiff's solicitors wrote to D10 stating inter alia that they are ready, willing and able to discharge their obligations and that D10 may be liable for interference and for acting contrary to the spirit and intent of the MA if D10 grant a third party rights to organise the race.
11 January 2016	The plaintiff's solicitors wrote to D10, inter alia, questioning the termination.
19 January 2016	The plaintiff's solicitors wrote to D10, inter alia, questioning the termination.
5 February 2016	DBKL wrote to the plaintiff's solicitors to confirm the termination and asserted its right to enter into contract with any third parties.
5 February 2016	Thirumaren a/l Munisamy affirmed and filed an affidavit on 5 February 2016 vide Kuala Lumpur High Court Originating Summons No WA-24NCC-47–02 of 2016 stating, inter alia, that the bank account of D11 is frozen as a result of the winding up petition filed by the plaintiff against D11.
25 February 2016	The plaintiff's solicitors wrote to D10 stating inter alia that it is intending to take steps to protect their rights.
March 2016	Derivative action filed vide WA-22NCVC-173-D3 of 2016 ('Suit 425') together with application for injunction.

April to May 2016	Affidavit in respect of the injunction application was exhausted.
20 May 2016	D9 filed application to strike out.

[5] In the main action the plaintiff, ADM Ventures (M) Sdn Bhd ('ADM') had initiated a derivative action by way of a representative action as a 50% shareholder on behalf of itself and for the benefit and on behalf of the 11th defendant, GT Global for basically the following reliefs:

(a) a declaration that the termination of the Memorandum of Agreement between the 10th Defendant and the 11th Defendant is unlawful, void and unenforceable;

(b) a declaration that the 1st Defendant is in breach of its duties as a joint venture party and under the terms of the Shareholders' Agreement dated 24/6/2015 between the Plaintiff and the 1st Defendant;

(c) a declaration that the 2nd to 6th Defendants are in breach of their statutory and fiduciary duties to the 11th Defendant;

(d) a declaration that the 7th Defendant is in breach of contract and duties of fidelity to the 11th Defendant;

(e) a declaration that the 8th Defendant is not entitled to enter into any contract with the 10th Defendant with respect to the KL City Race, by whatever name called, using the design and concept belonging to the 11th Defendant and alternatively, that any such contract be declared void if so entered;

(f) a declaration that the proceeds or income derived from any such contract with the 10th Defendant be held on trust for the 11th Defendant;

(g) an account be taken of the proceeds or income derived from any such contract with the 10th Defendant and be paid over to the 11th Defendant;

(h) an order that the 8th Defendant, whether by itself or through its servants, agents, employees and/or otherwise howsoever be restrained from organising and holding the KL City Race 2016 called 'KL City 400 Supercar Extravaganza' or by whatever other name the said race is called;

(i) alternatively, that Monitoring Accountants be appointed over the 8th Defendant, to assess and monitor its accounting procedure, keep account of assets, revenue, accrued income and receipts, ensure any payment made are legitimate and in the ordinary course of the business of the 8th Defendant and to otherwise preserve the assets of the 8th Defendant;

(j) further and/or alternatively, damages and exemplary damages for conspiracy, fraud on the minority, breach of fudiciary duties, breach of contract, procurement of a breach and/or unlawful interference and conversion;

(k) interest on all sums ordered to be paid at the rate and for a period deemed appropriate by this Honourable Court;

(l) costs; and

(m) any further or other relief deemed appropriate by this Honourable Court.

[6] The plaintiff's case in brief as pleaded in paras 17–21 of the statement of claim is as follows:

17. By these proceedings, ADM contends that TN, TK, Marcus, Neil and/or Dilantha wrongfully conspired to cause RC to wrest control of the GT Global BOD and to thereafter wrongfully assume management, secretarial and financial control of GT Global in breach of their fiduciary duties to GT Global and in abuse of their voting power and the terrns of the joint venture ('JV') between RC and ADM who are equal shareholders of GT Global.

18. Pursuant to and facilitated by their control of GT Global, the said Defendants in breach of their duties to GT Global conspired to wrongfully dissipate the assets of GT Global and, with the caused the termination of the Memorandum of Agreement and diversion of the Concession or profit centre and business of GT Global to City Motorsports or such other nominee of the 1st and 7th Defendants as may be identified after discovery and/or the administration of interrogatories and/or further and better particulars. The entire scheme was devised and implemented by 1st to 7th Defendants or two or more of them, aided and abeted by the 8th to 10th Defendants to cause loss and damage to GT Global and ADM and wrongfully invest City Motorsports or such other nominee with the rights of GT Global under the Memorandum of Agreement to the exclusion and detriment of GT Global and ADM.

19. The 1st to 7th Defendants thereby perpetrated a fraud on the minority in that one or more of them they have wrongfully procured a benefit for themselves or appropriated assets and caused the termination of the MOA with a view to diverting the Concession in favour of their nominee, at the expense of or to the loss of GT Global.

20. The Defendants or one or more of them are thereby jointly and/or severally liable for conspiracy, breach of duties, breach of trust, breach of contract, inducement to breach or unlawful interference as more particularly set out below.

21. This action has been brought for the benefit of GT Global upon the premise that GT Global has been wronged but is unable to sue as the wrongdoers have wrongfully wrested control of the GT Global BOD and will not for that reason permit an action to be brought in its name.

[7] Thus in its outline oral submission, Mr Porres Royan of counsel for the plaintiff stated:

1. There was a dispute between two rival groups of shareholders of GT Global (ie

D11 or 'the Company').

ADM Ventures filed a suit on 4/9/2015 seeking an injunction to stop the unlawfully convened BODM. Despite having notice of the pending injunction application, the BODM was held on 8/9/2015.

2. Due to the wresting of management and financial control by Renew Capital (D1) and Dilantha (D6) which led to a breakdown of substratum, ADM filed a Winding Up Petition on 13/10/2015.

3. DBKL was notified of the Winding Up Petition by letter dated 11/11/2015 [Exh TA-4 Encl 31]

HOWEVER, instead of staying their hand DBKL did the following (as pleaded in para 57.32 of the SOC) —

i. On or around 21/10/2015 — the representatives from RC (D1) and Faizal (D7) met with DBKL to discuss the proposal requesting the rights to the upcoming GT City Race KL.

ii. November/December 2015 — TN (D2), Marcus (D4) and Faizal (D7) met with DBKL Official to present their proposal to run the GT City Race KL.

iii. TA (D9) wrote to DBKL instructing them to award the rights to organise the race to City Motorsports.

iv. 1/12/2015 — ADM wrote to TA (D9) to request that GT Global's exclusive rights be preserved.

v. On/around 13/12/2015 — TN, Marcus and Datuk Najib (a senior DBKL officer) went to Sydney Australia to meet with principal officers of V8 and several international racing series.

4. By letter dated 11/1/2016 which was hand delivered on 12/1/2016 [Exh TM-1 Encl 57], DBKL (D10) was notified that ADM and GT Global were ready, willing and able to discharge the obligations under the MOA. DBKL was also put on notice to cease and desist from dealing with 3rd parties involving GT Global's rights under the MOA.

5. DBKL terminated the MOA by letter dated 11/1/2016 which was only received on 14/1/2016 [Exh MN-8 Encl 33 & Exh TA-6 Encl 31].

5. 1/3/2016 — proposal by City Motorsports.

6. On 2/3/2016, DBKL issued a conditional acceptance letter making reference only to the letter submitted by City Motorsports on 1/3/2016 [Exh TM-3 Encl 57].

It should be noted that DBKL maintained the position that it has the right to award the Concession to a third party and intended to do so. GT Global's exclusive right to the Race would have been diverted to City Motorsports if this derivative action to protect the rights of the Company was not filed. (See para 57 of the Statement of

Claim.)

FINDINGS

Whether the plaintiff has the locus standi to initiate the derivative action

[8] In respect of the common law derivative action, D10 submitted that the plaintiff did not have the locus standi to commence against it as the plaintiff has not satisfied the following conditions:

(a) whether the action falls within the proper boundaries of the exception to the rule in *Foss v Harbottle*;

(b) whether the wrongdoers were in actual control of the company;

(c) that the company is entitled to the relief claimed;

(d) loss/damage allegedly suffered is suffered by the company and not its members; and

(e) prima facie case is to be established to avoid unjustifiably subjecting the company to a full trial to enable the court to determine whether the plaintiffs were entitled in law to make the company undergo the entire action.

[9] Amongst the grounds relied on by D9 to strike out the plaintiff's claim are:

(a) the plaintiff should have brought the derivative action against D11's shareholders and not against third parties such as D9 and D10 because: (i) D9 is not a shareholder of the company (D11); and (ii) D9 does not control the company (D11). The cases of *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 and *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 were cited; and

(b) the plaintiff has no locus standi to bring the derivative action as the plaintiff is only the shareholder in D11 and the plaintiff failed to fulfill the criteria required to enable a shareholder to bring a derivative action against D9, a third party.

[10] One of the grounds relied on by D1–D6 and D11 to strike out the plaintiff's claim is the plaintiff has no locus standi to bring the derivative action as the third parties, namely Faizal, City Motorsports, TA and DBKL ought not to be named as defendants since they are neither shareholders nor directors of the company, D11.

[11] It is the plaintiff's case that it has the requisite locus standi to initiate the derivative action. The plaintiff's case is that the plaintiff is able to initiate the derivative action if it can establish:

(a) that the action falls within the exception of the principle of *Foss v Harbottle* (1843) 2 Hare 461:

(i) the rule in *Foss v Harbottle* prevents individual shareholders to bring the action in the name of the company for any wrong done to the company as the company is a separate legal entity. The exception to the rule in *Foss v Harbottle* that the plaintiff relied on was fraud committed upon the minority;

(ii) pertaining to 'fraud upon the minority', the plaintiff cited the case of *Abdul Rahim bin Aki* where Gopal Sri Ram JCA (as he then was) at p 418 stated:

> The expression 'fraud upon the minority' is a term of art and has absolutely nothing whatsoever to do with actual fraud or deception at common law. It includes lack of probity although it is not necessary to prove dishonesty. Therefore, it is sufficient for a plaintiff to show that those wielding majority control abused the powers vested in them by using or omitting to use their powers for an oblique or collateral motive or purpose and not for the true purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law. To equate common law fraud to 'fraud upon a minority' was clearly wrong.

(b) that those in control of the company have abused the powers vested in them:

In this regard the plaintiff relied on:

(i) *Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors* [2004] 6 MLJ 37 at p 49:

> In brief, aggrieved shareholders who have no remedy may sue, where directors having de facto control of the affairs of the company had or had not used their powers in a manner that may benefit themselves, at the expense of the company. Control can come in many forms, and may be carried out in many ways especially by manipulations, deliberately to ensure that the company is prevented from taking up any action for its own benefit.

(ii) *Tan Guan Eng* that the concept of 'control' of a company embraces a broad spectrum of positions within a company and that control could also arise as the result of indifference and apathy (per Edgar Joseph Jr J (as he then was) at p 499 E).

[12] The plaintiff submitted:

> This derivative action was filed by ADM (a shareholder of GT Global) following the fraud committed by the 1st to the 6th Defendants who had wrongfully wrested control of GT Global's BOD and had subsequently wrongfully caused the termination of the MOA and the diversion of the Concession (which is GT Global's profit centre) to City Motorsports (their nominee company). The gth and 10th Defendants knowingly assisted and/or participated in this conspiracy which caused loss and damage to GT Global and the Plaintiff.
>
> In short, the fraud on the minority was perpetrated by TN, TK, Marcus, Neil and Dilantha as directors of GT Global by conspiring with Faizal, City Motorsports, TA and DBKL.
>
> It is our pleaded case that TN, TK, Marcus, Neil and Dilantha had wrongly wrested control of GT Global's BOD. The inversion of the members of the signatory groups [is] a clear indicator that RC and the directors aligned with it had de facto control over GT Global.

The inversion of the signatory groups alleged by the plaintiff occurred in this manner:

> The agenda for the 5/10/2015 BODM proposed that TK be appointed additional signatory to Group A ie RC's Group A. However, in breach of the JV terms and the agenda, members of RC Group A and ADM Group B were improperly inverted and the 2nd to 6th Defendants fraudulently approved the appointment of TK. as additional signatory to the ADM Group without the consent of ADM's own signatories, Arrasu and Maren, who were not present at the BODM. This was done deliberately to wrest control of the finances of GT Global to the exclusion of ADM. RC has since been able to unilaterally effect monetary transactions without reference to the ADM Group signatories, Arrasu and Maren.

[13] Further, Mr Porres Royan in the plaintiff's oral submission added:

(i) TA and DBKL are being sued as Defendants in respect of a tort against GT Global.

(ii) Since those in control of the management of the Company (who are co-conspirators) will not bring an action against them, the only remedy is by way of derivative action.

(iii) So long as there is fraud on the minority that prevents the Company from bringing an action against wrongdoers, the minority can bring a derivative action on behalf of the company against all the wrongdoers.

(iv) No reported cases that suggest that a derivative action may only be brought against those in control of the company.

(v) In *Perak Integrated Network Services Sdn Bhd v Urban Domain Sdn Bhd & Anor* [2016] 6 CLJ 820 it was held that —

> The second respondent was disabled from taking action against the appellant ... Derivative action is a procedural convenience for enabling the Court to do justice and for the benefit of the company which is controlled by miscreant

director and shareholder and persons associated to them.

Further, it also held that a derivative action lies of the wrongdoers is in control and does not depend on whether the aggrieved shareholder is majority or minority shareholders.

[14] The plaintiff further submitted there is no restriction in law in naming third parties as defendants citing *Ranjeet Singh Sidhu v Zavarco Plc* [2015] MLJU 638; [2016] 2 CLJ 975, wherein lawyers (who were involved in the conspiracy alleged) were named as defendants in the derivative action. In the context of this case, the plaintiff submitted that the third parties, namely Faizal, City Motorsports, TA and DBKL were rightfully named as defendants as: (i) the fraud on the minority was committed through the tort of conspiracy and D1–D6 conspired with the said third parties in order to divert the concession to the benefit of D1–D6; and (ii) D1–D6 will not take any action against the third parties (and themselves) for the conspiracy considering that all the directors of GT Global save for Arassu and Maren were involved in the conspiracy (see paras 5 and 6 above).

[15] I find the plaintiff has not established that the plaintiff has the locus standi to initiate the derivative action for the following reasons.

Bearing in mind the concessions made by the plaintiff in respect of the threshold argument of locus standi (see para 3 above) I shall deal with the submission of DBKL (D10) as to whether the plaintiff has satisfied the pre-conditions before commencing a common law derivative action, against the defendants.

Whether the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle

[16] As correctly submitted by D10, the plaintiff has to establish on a higher scale that D10 has fraudulently acted against D11. In this regard I relied on the case of *See Hua Realty Bhd (suing on behalf of itself and all other shareholders of the defendant except for the first and second defendant) v KTS News Sdn Bhd & Ors* [2016] 1 MLJ 92 wherein the Court of Appeal at p 100 para [12] stated as follows:

> [12] The prayers in the statement of claim from pp 94–97 consisting of declaratory relief as well as relief essentially relates to finding of facts as well as discretion of the court and falls within the domain of the trial judge. Though the discretion cannot be exercised arbitrarily the court is duty bound to weigh the strict rule advocated in Foss v Harbottle and the exceptional relief which can be pursued by way of derivative action in matters relating to managerial decision. The courts are slow to infer impropriety or fraudulent conduct. And the burden of proof on allegation of fraud or even impropriety has to be weighed on a higher scale as advocated in the

case of *Miller v Minister of Pensions* [1947] 2 All ER 372. A

[17] Based on the evidence before the court, I find the plaintiff has failed to establish there has been a fraud on the minority for the following reasons submitted by D10 which I adopted: B

(a) the only relation D10 has with D11 is through the memorandum of agreement and DBKL financial assistance agreement and parties are bound by the terms therein. If there is any breach of the terms of these agreements, then D10 has the right to terminate these agreements; C

(b) D11 did not reply to the demands made by D10 on the outstanding sums payable by D11 from the organisation of the GT City Race KL. It was the plaintiff who had forwarded the Winding Up Petition 857 and represented to D10 of the incapability of D11 to organise the City Race 2016 and have now filed the plaintiff's claim seeking reliefs to prohibit the organisation and execution of City Race 2016; D

(c) with regard to the allegation that there is a breach of contract by D10 in terminating the memorandum of agreement, it was the plaintiff who had represented to D10 that D11 is insolvent and is incapable of paying its creditors and is subjected to multiple proceedings and several winding up proceedings; E

(d) in view of this, it is practically impossible for D11 to organise the City Race 2016 within the scheduled time and therefore D10 had validly terminated the memorandum of agreement; F

(e) with regards to the inducement of breach of the memorandum of agreement, this is devoid of any merits as the termination is supported by the facts stated in Winding Up Petition 857 filed by the plaintiff;

(f) With serious issues faced by D11, D11 is no longer capable of organising City Race 2016 in accordance to the terms of the memorandum of agreement; G

(g) the plaintiff now seems to give an undertaking to organise City Race 2016. This is a clear breach of the terms of the memorandum of agreement. The party D10 entered into the memorandum of agreement and gave rights to organise the city race is D11. By allowing the plaintiff to organise City Race 2016, it is equivalent to D10 giving the rights to organise the race to a third party. The plaintiff cannot file the plaintiff's claim for its own benefit; and H I

(h) D10 should only take into account the ability of D11 to perform its obligations under the memorandum of agreement and to organise the

city race with its own funds for five years from 2015 which D11 had failed to do which lead to the termination of the memorandum of agreement.

Whether the wrongdoers were in actual control of the company

[18] The evidence showed that D10 was not aware of the internal management and dispute in D11. I find it is impossible for D10 to be a wrongdoer of D11 as it is neither a shareholder nor director of D11:

(a) further, the plaintiff has also failed to establish that the plaintiff has exhausted all avenues with the majority of D11 that D11 refuse to take any action against D10 if D11 is of the opinion that the termination of the memorandum of agreement is unlawful or invalid.

(b) amongst the reasons stated by the plaintiff in the Winding Up Petition 857 are:

(i) there are internal disputes between the shareholders of D11 which are the plaintiff and D11 which cannot be resolved;

(ii) the substratum of the partnership in D11 has been destroyed and the plaintiff and D11 can no longer work with one another;

(iii) D11's creditors are not being paid; and

(iv) D11 is in an insolvent state and its accounts cannot be finalised. Due to the outstanding amount still due and payable by D11 to D10 from the GT Race 2015 and the reasons for the Winding Up Petition 857, it is apparent that D11 cannot organise City Race 2016; and

(c) further, D10 only started to negotiate with third parties with regards to organising City Race 2016 after the termination of the memorandum of agreement with D11. This proved that the plaintiff's claim is filed for the benefit of the plaintiff and not D11.

[19] *Ranjeet Singh*'s case relied on by the plaintiff to augment its position that a derivative action can be brought against a third party can be distinguished as follows:

(a) the issue raised in *Ranjeet Singh* as far as the third party is concerned (the lawyer) is on whether the action against the lawyer should be struck out for insufficient particulars of fraud and/or conspiracy to defraud;

(b) the issue of whether derivative action can be brought against a third party was never raised in the above case;

(c) the fact that a derivative action was brought against a third party (lawyer) in the above case which was not objected by the lawyer does not make it a precedent to bring derivative action against third parties;

(d) *Ranjeet Singh*'s case deals with statutory derivative action and the principles of double and multiple derivative action which is not relevant to our present case which involves only a single company which is D11 and the common law derivative action;

(e) in *Ranjeet Singh*'s case, the plaintiff reserved their right to file for discovery as it lacked particulars and hence the court did not allow the striking out and ordered that even there is no reasonable cause of action, the court will be inclined to allow the plaintiff to amend the statement of claim;

(f) however in the present case, the plaintiff had taken almost a month after filing the writ to file the plaintiff's claim and the facts are clear wherein the facts are deposed and affirmed by the plaintiff in Winding Up Petition 857 and the facts are stated in various civil proceedings involved between the plaintiff and D1 to D7 (which does not concern D10) which supports the grounds on which D10 terminated the memorandum of agreement, hence the plaintiff's claim does not disclose any cause of action on D10. The various civil proceedings are:

No	Case Number	Plaintiff	Defendant	Subject Matter
1	Winding Up Petition No 28NCC-857–10 of 2015 (KL)	Plaintiff	11th	To wind up 11th
2	Originating Summons No 24NCC-360–10 of 2015 (KL)	6th Defendant	Plaintiff & 2 Others	S 181 of the Companies Act — oppression
3	Winding Up Petition No 28NCC-886–10 of 2015 (KL)	6th Defendant	Plaintiff	S 218 Petition to wind up Plaintiff on just and equitable grounds.
4	Civil Suit No 22NCC-355–11 of 2015 (KL)	6th Defendant	Plaintiff and its shareholders	Specific performance of an agreement made internally in the Plaintiff

5	Civil Suit No WA-22NCC-284–08 of 2016	11th Defendant	Global City Grand Prix Sdn Bhd	Siphoning of Contract
6	Civil Suit No WA-22NCC-19–01 of 2016	1st and 2nd Defendants	Shareholders of Plaintiff	Fraud and mis-representation on Sanction Agreement
7	Civil Suit No 22NCC-28–02 of 2016 (KL)	6th Defendant	Plaintiff and its shareholders	Declaration that 6th Defendant was removed as director illegally
8	Civil Suit No WA-22NCC-272–08 of 2016	11th Defendant	Plaintiff's shareholders	Declaration for breach of fiduciary duties
9	Civil Suit No WA-22NCC-34–01 of 2016 (KL)	11th Defendant	Plaintiff and its shareholders	Loss of profits for termination of concession by DBKL
10	Civil Suit No 22NCC-410–12 of 2016 (KL)	2nd Defendant	Plaintiff Damages and injunction	
11	Civil Suit No WA-22NCC-350–10 of 2016 (KL)	4th Defendant	Plaintiff	Damages and injunction
12	Civil Suit No WA-22NCC-245–06 of 2016	Plaintiff & 2 Others	1st, 2nd, 4th, 6th and 11th Defendants	Substantive Action
13	Civil Suit No WA-24NCC-47–02 of 2016	Plaintiff	1st to 8th and 11th Defendants	S 181 Minority Oppression

(g) there are no conclusive particulars pleaded on D10 but merely a speculation on the part of the plaintiff. The plaintiff has failed to explain till to date on their contrary positions taken in the Winding Up Petition 857 and in this plaintiff's claim. It is the plaintiff who filed a winding up petition against D11 on the grounds of insolvency, frozen bank accounts and shareholders who could not work together any longer. The plaintiff cannot now in this plaintiff's claim say that the plaintiff together with D11 can organise the City Race 2016 which is a clear breach of the

memorandum of agreement. The plaintiff is estopped by their own conduct and cannot take contrary stands.

[20] Further a distinction has to be drawn between a statutory derivative action brought under s 181 CA 1965 as opposed to the common law derivative action upon which the plaintiff initiated the present suit. In *Kondapuram Raghuram v Soo Peng @ Yew Soo Peng* [2006] 7 MLJ 510, Ramly Ali J (now FCJ) held:

(1) Relief under s 181 of the Act should be granted where the petitioner can show that the respondents were in control of the company and were exercising that control in the affairs of the company in a manner which was oppressive to the petitioner. In appropriate cases, an employee of the company who is responsible for any act which amounts to an act of the company may be cited as respondent in a petition, under s 181 depending under which limb the petitioner relies on his case (see para 17).

(2) *Section 181 of the Act can be invoked against any oppression, whether or not that the oppressor is a director or has controlling interest in the company. The wordings of s 181 conferred the widest jurisdiction on the court as regards parties against whom relief could be sought* (see *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420, *Lowe v Fahey* [1996] 1 BCLC 262, *Re a Company* [1986] BCLC 68 applied. *The wordings of s 181 envisage that a petition can be directed against any person who is involved in the affairs of the company or involved in some act of the company in a manner oppressive or which unfairly discriminates or prejudicial to the members, shareholders of debenture holders, not necessary against the directors or shareholders only* (see paras 21, 22 & 26). (Emphasis added.)

[21] Based on the emboldened dicta in *Kondapuram Raghuram*, it is my respectful view that unlike the statutory derivative action under s 181 CA 1965 where a petition can be directed against any person, not necessarily against the directors or shareholders only, who is involved in the affairs of the company or involved in some act of the company in a manner oppressive or which unfairly discriminates or prejudicial to the members, shareholders of debenture holders, in a common law derivative action third parties cannot be named as defendants.

CONCLUSION

[22] For the reasons discussed above, I concluded the plaintiff has no locus standi to initiate the present case against the defendants. In the circumstances, encls 32, 30 and 36 are allowed with costs of RM15,000 each and encls 17 and 18 are allowed with costs of RM15,000 to be paid by the plaintiff to D10, D9 and D1–D6, D7 and D8 respectively.

A *Defendants' applications allowed with cost to be paid to defendant.*

Reported by Mohd Kamarul Anwar

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